

**Before the
FEDERAL COMMUNICATIONS COMMISSION
Washington, D.C. 20554**

| | |
|--|---------------------------------------|
| In the Matter of |) Billed Entity Number: 157779 |
| |) Funding Year 2014 |
| Request for Waiver of Section 54.511(a) of |) FCC Form 471 Application No. 990161 |
| the Commission's Rules by |) Funding Request No. 2702074 |
| |) |
| Puerto Rico Department of Education |) |
| |) |
| Schools and Libraries Universal Service |) CC Docket No. 02-6 |
| Support Mechanism |) |

ATT: Telecommunications Access Policy Division
Wireline Competition Bureau

REQUEST FOR LIMITED WAIVER

December 12, 2014

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SUMMARY

The Puerto Rico Department of Education (“PRDE”), as part of its evaluation of cost proposals for WAN services for Funding Year 2014 under the E-rate program, created a Vendor Evaluation Matrix in which the price of the eligible products and services at eligible locations was the primary factor, weighted more heavily than any other single factor. PRDE also considered within the price category the cost of service to a number of PRDE schools and non-instructional facilities that were not yet eligible for E-rate funding, but that PRDE intends to bring up to eligibility (for example, through electrical upgrades) during the term of the multi-year contract. Due to an oversight, PRDE did not include in its Vendor Evaluation Matrix a separate category for the cost of service to ineligible locations that was weighted at less than 35 percent. However, as demonstrated herein, PRDE selected the lowest-cost provider.

Relevant documentation demonstrates that the selected vendor’s cost proposal for the provision of WAN service to eligible locations is 31.5 percent lower than that submitted by the other qualified vendor, and that the selected vendor’s cost proposal for the provision of WAN service to ineligible locations is 30.1 percent lower than that submitted by the other qualified vendor. As demonstrated in this Request, PRDE selected the lowest cost proposal, thus obtaining the advantage of competition to the fullest extent possible consistent with the Commission’s goal of ensuring that E-rate services be provided at the lowest possible rates. Commission precedent establishes that where the winning vendor’s cost proposal is lower than the competing bids and the applicant selects the least expensive service offering, and in the absence of waste, fraud or abuse, or misuse of funds, a limited waiver of the relevant Commission’s rules is in the public interest. This is plainly the case here and a limited waiver would be in the public interest.

In addition, PRDE fully complied with all other core program requirements, conducted a fair and open competitive bidding process, complied with all PRDE and Puerto Rico Government procurement laws, cost allocated the cost of service to ineligible locations from its funding request in a manner consistent with USAC guidance, and did not engage in any practice that undermines the framework of the competitive bidding process. Based on these facts, PRDE respectfully requests a limited waiver of the Commission's rules to permit USAC to continue to process PRDE's funding request for Funding Year 2014.

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ATT: Telecommunications Access Policy Division
Wireline Competition Bureau

REQUEST FOR LIMITED WAIVER

The Puerto Rico Department of Education of the Commonwealth of Puerto Rico ("PRDE"), pursuant to Section 1.3 of the Federal Communications Commission's ("FCC" or "Commission") rules,¹ hereby petitions the Commission's Wireline Competition Bureau ("Bureau") for a waiver of Sections 54.503(c) and 54.511(a) of the Commission's rules² with respect to the above-referenced FCC Form 471 application for Funding Year 2014 ("FY2014") and any other relevant Commission rule to the extent such a waiver is necessary for the Universal Service Administrative Company ("USAC") to continue to process PRDE's request for funding for FY2014. PRDE also requests a waiver of any other Commission rule establishing procedural deadlines (such as the invoicing deadline) that might be necessary to effectuate a waiver.

¹ 47 C.F.R. § 1.3.

² 47 C.F.R. §§ 54.503(c), 54.511(a). As of the filing of this Request for Limited Waiver, USAC has not informed PRDE the specific Commission rule or rules that may have been violated. However, PRDE assumes, in good faith, that USAC is referring to Sections 54.503(c) and 54.511(a).

Section 54.503(c) provides that “All bids submitted for eligible products and services will be carefully considered, with price being the primary factor, and the bid selected will be for the most cost-effective service offering consistent with § 54.511.”³ In turn, Section 54.511(a) provides that, “In determining which service offering is the most cost-effective, entities may consider relevant factors other than the pre-discount prices submitted by providers, but price should be the primary factor considered.”⁴ USAC’s *Intent to Deny Letter*, dated September 25, 2014, states that: “The cost for the ineligible entities can be included in the bid evaluation matrix as long as it is a separate factor and is not included with the eligible portion of the products and services as the primary factor.”⁵

In this case, PRDE properly considered price as the primary factor in its vendor selection, giving the most weight (35 percent) to this category. However, within this category, in addition to considering the cost of service to locations that are currently eligible for E-rate funding, PRDE also considered the cost of service to locations that are currently ineligible for E-rate funding, but which PRDE intends to make E-rate ready in the near future during the term of the multi-year contract awarded. Failure to create a separate category in the Vendor Evaluation Matrix for the cost of service to ineligible locations was an oversight, which PRDE regrets and will correct for future competitive bidding processes. However, as demonstrated below, such an oversight does not change the fact that PRDE selected the lowest-cost provider and obtained the advantage of competition to the fullest extent possible consistent with the Commission’s goal of ensuring that

³ 47 C.F.R. §54.503(c).

⁴ 47 C.F.R. §54.511(a).

⁵ See Letter from Dhara Patel, Associate Manager, Selective Review, Universal Service Administrative Company, to Maribel Pico Piereschi, Puerto Rico Department of Education (dated Sept. 25, 2014) (“*Intent to Deny Letter*”). The *Intent to Deny Letter* is attached as Exhibit A. The *Intent to Deny Letter* refers PRDE to USAC’s website “for additional guidance on vendor selection” and provides the following link: <http://www.usac.org/sl/applicants/step03/evaluation.aspx>. The information available at this web page includes the following statement: “Note that the most heavily weighted price factor cannot include ineligible costs, although those can be included in an evaluation as long as they are in a separate price factor that is weighted less heavily.”

services be provided at the lowest possible rates. PRDE fully complied with all other core program requirements, conducted a fair and open competitive bidding process, complied with all PRDE and Puerto Rico Government procurement laws, cost allocated the cost of service to ineligible locations from its funding request in a manner consistent with USAC guidance, and did not engage in any practice that undermines the framework of the competitive bidding process. Based on these facts, PRDE respectfully requests a limited waiver of the Commission's rules to permit USAC to continue to process PRDE's funding request for FY2014.

I. BACKGROUND

Filing of Form 470. On December 20, 2013, PRDE posted FCC Form 470 No. 913060001186890 on USAC's website describing the eligible services it was seeking.⁶ The FCC Form 470 indicated that procurement rules and restrictions with regard to PRDE's competitive bidding procedures were set forth in a Requests For Proposal ("RFP"), which was available on PRDE's website. The FCC Form 470 established an Allowable Contract Date of January 17, 2014.

WAN/Internet Request For Proposals. On December 20, 2013, concurrently with the posting of FCC Form 470, PRDE released the above-referenced RFP seeking bids for a high-speed, data communications Wireless Area Network ("WAN") to connect its schools and non-instructional facilities ("NIFs") to PRDE's main data center and high-speed Internet service. The RFP was primarily based on PRDE's Technology Plan, which outlines a needs assessment of telecommunication services, hardware, software, Internet connectivity and its distribution, and other services that are needed to improve education in Puerto Rico.

⁶ PRDE's Form 470 No. 913060001186890 is attached as Exhibit B.

The RFP stated that some schools were “E-rate ready” while others were not. The RFP explained that the purpose for including locations that were not yet eligible for E-rate funding – but which PRDE intended to make E-rate eligible during the term of the contract (such as, for example, through electrical upgrades) – was to avoid having to engage in a new competitive bidding process each year of the contract as the ineligible schools and locations became eligible. Specifically, the RFP stated:

The Department’s WAN consists of approximately 1461 schools and 62 administrative facilities. Of the total entities/sites, approximately 1185 schools and 60 administrative facilities meet the E-Rate requirements for funding eligibility. The remaining 276 schools and 2 non-instructional facilities (“NIFs”) are currently not eligible for E-Rate services, or are receiving services outside of the Department’s E-Rate program. One of the key goals of the Department’s Technology Plan is to bring as many of the ineligible schools and NIFs up to eligibility as soon as possible. Accordingly, the Department has structured this RFP and the FY2014 competitive proposal process to ensure that E-Rate funding is available for the additional schools and NIFs that become eligible during the term of the contract. First, all of the Department’s schools and NIFs (eligible and ineligible) are being competitively bid as part of FY2014. Specifically, this RFP, and the Form 470 posted in connection with this RFP, include all of the Department’s schools and NIFs, which will avoid the Department having to engage in a new competitive bidding process each year of the contract as schools and NIFs become eligible. Second, the Department will file separate applications or FRNs each year for all of its then ineligible schools and NIFs. By including all locations in the FY2014 competitive bidding process, the Department will preserve funding for entities upgraded to meet eligibility standards during the term of the contract and also ensure that services will be delivered to both its eligible and ineligible entities/facilities for the same cost-effective pricing.⁷

Page 41 in the RFP states that the PRDE’s Evaluation Committee would apply the following criteria and weights:⁸

⁷ Puerto Rico Department of Education, Request for Proposals For E-Rate FY2014 Wide Area Network and Internet Service, at p. 8 (dated Dec. 20, 2013) (“RFP”). The RFP is attached as Exhibit C.

⁸ Exhibit B, RFP at p. 41.

| EVALUATION CRITERIA | WEIGHTS |
|---|-------------|
| PRICE OF ELIGIBLE PRODUCTS AND SERVICES | 35% |
| Professional qualifications and experience providing proposed services | 20% |
| Responsiveness of proposal to RFP terms, conditions and required submittals, and quality of proposed solutions and products | 15% |
| Quality of proposed Service Level Agreement (SLA) | 15% |
| E-Rate program knowledge and experience | 10% |
| Past performance on contracts with other comparably sized school systems, government agencies or businesses other than PRDE | 5% |
| TOTAL: | 100% |

As reflected in the table above, PRDE assigned the highest weight (35 percent) to the price of eligible products and services.

PRDE went to great lengths to design an RFP that would ensure that bidders would break out the cost of service to eligible locations from the cost of service to ineligible locations to permit PRDE to consider those costs separately. First, PRDE required that vendors allocate the total proposal costs between eligible and ineligible charges, as demonstrated in Section VI (3)(D)(4) in the RFP, which reads:

Vendors are required to allocate the total proposal costs between eligible and ineligible charges in the space(s) indicated on the applicable Price Proposal Form(s) (APPENDIX VI, FORM 2). Vendors are strongly encouraged to refer to the SLD website (<http://www.universalservice.org/sl/>) for information on product and service eligibility and cost allocation requirements, including the FY2014 Eligible Services List (“ESL”).⁹

Second, Appendix I to the RFP (titled “PRDE Schools and Non-Instructional Facilities”) included two lists: one with each of the 1,242 eligible schools and NIFs, and one with each of the 282 non-eligible schools and NIFs.¹⁰ Finally, Appendix VI to the RFP (titled “Proposal Submittal Forms”) included a sample WAN Price Proposal Form, which required bidders to

⁹ Exhibit B, RFP at pp. 36-37.

¹⁰ Exhibit B, RFP, Appendix I.

specify the cost of service to eligible locations in Part 1 of the Form and the cost of service to ineligible locations in Part II of the Form.¹¹

Vendor Selection Process. PRDE received two qualified proposals to provide WAN service in response to the RFP: one from AT&T¹² and one from Puerto Rico Telephone Company, Inc. d/b/a Claro (“Claro”).¹³ PRDE instituted an Evaluation Committee composed of the following officials: Lourdes Dias, Norma Rolón and Vilmarys Quiñones, each of who executed an “E-rate Evaluation Committee Member Agreement” with PRDE representing that they would be fair, honest and impartial in fulfilling their obligations as voting members of the Evaluation Committee. The Evaluation Committee had at its disposal assistance from three in-house Technical Advisors (Francisco Alonso, Victor Ortíz and Edgar Estrada) as well as PRDE’s outside E-rate consultants (Wynndalco Enterprises LLC).¹⁴ The Evaluation Committee, Technical Advisors and the E-rate consultants met on multiple occasions to discuss the E-rate program rules and the vendor selection process. For instance, Meeting Minutes dated February 20, 2014 reflect the following discussion regarding consideration of price of eligible products and services:

Pricing of Eligible Products and Services (Weight – 35%). Ms. Williams stressed that pricing ... must be the most heavily weighted criteria, and that it should be based on the actual amounts proposed by the vendors, meaning the total dollar amounts quoted by vendors for *eligible* products and services. That the voting member should not consider *ineligible* pricing of products and services, the quality of the products and services, vendor experience, etc. when rating vendors on pricing. Those other considerations,

¹¹ Exhibit B, RFP, Appendix VI.

¹² AT&T’s cost proposal for FY2014 is attached as Exhibit D.

¹³ Claro’s cost proposal for FY2014 is attached as Exhibit E.

¹⁴ Neither the Technical Advisers nor the E-rate consultants were permitted to vote on any aspect of the cost proposals.

including the pricing of ineligible products and services can be evaluation criteria, but if so, they would need to be lesser weighted designated criteria.¹⁵

Comparing both proposals for the cost of service to eligible locations, they demonstrate that Claro's annual cost proposal was \$7,563,864 and AT&T's annual cost proposal was \$9,537,095, as shown in the chart below. Thus, Claro's proposal for service to eligible locations was approximately 31.5 percent cheaper than AT&T's. Comparing both proposals for the cost of service to ineligible locations, they demonstrate that Claro's annual cost proposal was \$1,687,236 and AT&T's annual cost proposal was \$2,195,576, as shown in the chart below. Thus, Claro's proposal for service to ineligible locations was approximately 30.1 percent lower than AT&T's.

| Vendor | Cost of Service to Eligible Locations | | Cost of Service to Ineligible Locations | |
|--------|---------------------------------------|--------------|---|-------------|
| | Annual Cost | 4-year | Annual | 4-year |
| Claro | \$7,563,864 | \$30,255,456 | \$1,687,236 | \$6,748,944 |
| AT&T | \$9,948,137 | \$39,792,551 | \$2,195,576 | \$8,782,304 |

On March 20, 2014, the Evaluation Committee carefully reviewed the bids received with price – at 35 percent – being the primary factor considered. The Evaluation Committee compared the cost of service to eligible locations and determined that Claro's was the lowest proposal. The Evaluation Committee also compared the cost of service to ineligible locations and determined that Claro's was the lowest proposal. After evaluating and scoring the vendors in six categories, AT&T received a total of 46 points (representing a total score of 67%) and Claro received a total of 48 points (representing a total score of 78%), as reflected in the Vendor

¹⁵ See February 20, 2014 Meeting Minutes, at p. 2, attached as Exhibit F (emphasis added). "Ms. Williams" refers to Ms. Elaine Williams, the former E-rate director contracted by Wynndalco Enterprises, LLC. Ms. Williams had primary responsibility for assisting PRDE during the 2014 bid evaluation process. Ms. Williams has not been affiliated with PRDE's external E-rate consultants since June 2014.

Evaluation Matrix.¹⁶ The summary of the Vendor Evaluation Matrix, showing both the total rating and score of each proposal is shown below. Thus, the Evaluation Committee recommended that Claro be selected as the winning bidder for the provision of WAN service.

WAN/INTERNET-OSIATD-2014-001
WIDE AREA NETWORK (WAN)

| | CRITERIA | WEIGHT | AT&T | | PRTC | |
|---|---|-------------|-----------|------------|-----------|------------|
| | | | RATING | SCORE | RATING | SCORE |
| 1 | PRICE OF ELIGIBLE PRODUCTS AND SERVICES | 35% | 4 | 14% | 6 | 21% |
| 2 | PROFESSIONAL QUALIFICATIONS AND EXPERIENCE PROVIDING PROPOSED SERVICES | 20% | 8 | 16% | 10 | 20% |
| 3 | RESPONSIVENESS OF PROPOSAL TO RFP TERMS, CONDITIONS AND REQUIRED SUBMITTALS, AND QUALITY OF PROPOSED SOLUTIONS AND PRODUCTS | 15% | 6 | 9% | 10 | 15% |
| 4 | QUALITY OF PROPOSED SERVICE LEVEL AGREEMENT (SLA) | 15% | 10 | 15% | 8 | 12% |
| 5 | E-RATE PROGRAM KNOWLEDGE AND EXPERIENCE | 10% | 8 | 8% | 5 | 5% |
| 6 | PERFORMANCE ON CONTRACTS WITH COMPARABLE SCOPES OF SERVICES FOR BUSINESSES AND ORGANIZATIONS OTHER THAN PRDE | 5% | 10 | 5% | 9 | 5% |
| | | 100% | 46 | 67% | 48 | 78% |

As previously stated, the Evaluation Committee was able to compare AT&T's and Claro's proposal for eligible locations as well as AT&T's and Claro's proposal for ineligible locations because the RFP required bidders to allocate the total costs between eligible and ineligible locations. In this process, the Evaluation Committee's only oversight was that the Vendor Evaluation Matrix did not include a separate category for the cost of service to ineligible locations that was weighted less heavily than 35 percent. However, since Claro's cost proposal for both types of locations (separately and collectively) was significantly lower than AT&T's, the vendor selection result would have been the same had PRDE included the cost of service to ineligible locations in a separate price factor that was weighted less heavily than 35 percent.

On March 26, 2014, PRDE and Claro entered into a contract for the provision of WAN services. The term of the contract is four years from July 1, 2014 through June 30, 2018.

¹⁶ The complete Vendor Evaluation Matrix is attached as Exhibit G.

Filing of Form 471. On March 26, 2014, PRDE timely filed Form 471 No. 990161, Funding Request No. 2702074, for FY2014. This application sought E-rate funding for eligible services and locations only. PRDE was aware that it could seek E-rate support only for eligible locations, as demonstrated in the March 3, 2014 Meeting Minutes for FY2014, which indicates:

Ms. Williams clarified a statement made in the past meeting about contract scope. She stated that there are 1245 eligible sites, and about 300 that are not. She explained that all of the sites are included in the Form 470, RFP (and contract), because the goal is to bring all of the remaining sites/schools up to eligibility during term of the contract. Therefore, in order to be eligible for E-Rate funding in the future, the ineligible sites must be included in the current competitive bidding process. As a result, the total annual contract pricing will be for all schools, *but that the actual FY2014 E-Rate application will only include eligible sites* -- the contract will include all sites to permit the Department to include sites brought into eligibility on subsequent applications, without re-bidding or having to amend the contract. If not handled this way, Ms. Williams explained that the Department would have to undertake a new competitive bidding process in order to apply for E-Rate funding for new eligible schools that are not included in the FY2014 E-Rate contract.¹⁷

At no point has PRDE attempted to apply for E-rate funds for ineligible services or for locations that are not eligible.

USAC Selective Review. On September 25, 2014, USAC sent an Intent to Deny Letter to PRDE stating the following:

Based on the documentation you provided during the Selective Review, FCC Form 471 Application #990161, FRN 2702074 will be denied because you did not fairly evaluate bidders based on the cost of eligible services. When evaluating the price of each proposal, it appears that you were comparing the total cost of the proposals including the cost for ineligible locations and not just the cost for the eligible locations. FCC rules require applicants to carefully consider all bid solutions and chose the most cost effective solution with price of the eligible products and services being the highest weighted factor in the bid evaluation process. The cost for the ineligible entities can be included in the bid evaluation matrix as long as it is a separate factor and is not included with the eligible portion of the products and services as the primary factor. Because you included the cost for ineligible entities in your evaluation of the price of each proposal, funding will be denied.¹⁸

¹⁷ March 3, 2014 Meeting Minutes, at p. 4, attached as Exhibit H (emphasis added).

¹⁸ Exhibit A, *Intent to Deny Letter* at p. 1.

PRDE submitted its response to the *Intent to Deny Letter* on October 2, 2014.¹⁹ On November 14, 2014, PRDE representatives held a conference call with USAC officials regarding PRDE's consideration of the cost of service to ineligible locations within the price category weighted at 35 percent. On November 20, 2014, PRDE made a written submission to USAC to correct an error in its October 2, 2014 response, and to provide additional information demonstrating that although the Vendor Evaluation Matrix did not include the cost of service to ineligible locations in a separate price factor, PRDE did select the vendor that provided the lowest cost proposal for eligible services to eligible locations.²⁰ The November 20, 2014 letter from PRDE also requested that, if USAC was not persuaded by the additional information, that it be given an opportunity to seek a waiver from the Commission rather than denying the application immediately. On December 4, 2014, USAC informed PRDE that USAC intended to deny the application within two weeks, but that it would hold the application in abeyance during that two-week period to afford PRDE an opportunity to seek relief from the Commission.

As explained below, Commission precedent establishes that where the winning vendor's cost proposal is lower than the competing bids and the applicant selects the least expensive service offering, and in the absence of waste, fraud or abuse, or misuse of funds, a limited waiver of the relevant Commission's rules is in the public interest. This is plainly the case here. Therefore, PRDE seeks a limited waiver of the Commission requirement that applicants include a separate category for the cost of service to ineligible locations that is weighted less heavily than the cost of service to eligible locations.

¹⁹ Letter from Maribel Pico, Puerto Rico Department of Education, to Dhara Patel, Associate Manager, Selective Review, Universal Service Administrative Company (dated Oct. 2, 2014), attached as Exhibit I.

²⁰ Letter from Maribel Pico, Puerto Rico Department of Education, to Mel Blackwell, Vice President, Schools and Libraries Division, Universal Service Administrative Company (dated Nov. 20, 2014), attached as Exhibit J.

II. A WAIVER IS CONSISTENT WITH COMMISSION PRECEDENT AND WILL SERVE THE PUBLIC INTEREST.

Waiver Standard. Generally, the Commission's rules may be waived if good cause is shown.²¹ The Commission may exercise its discretion to waive a rule where the particular facts make strict compliance inconsistent with the public interest.²² In addition, the Commission may take into account considerations of hardship, equity, or more effective implementation of overall policy on an individual basis.²³ The Commission has stated that waiver of its rules is appropriate only if both (i) special circumstances warrant a deviation from the general rule, and (ii) such deviation will serve the public interest.²⁴

A. PRDE selected the vendor that provided the lowest cost proposal for eligible services to eligible locations.

In this case, PRDE's Evaluation Committee considered the cost of service to eligible locations separately and apart from the cost of service to ineligible locations, and it concluded that Claro's proposal was the most cost effective. The Evaluation Committee also considered the cost of service to ineligible locations separate and apart from the cost of service to eligible locations, and it concluded that Claro's proposal was the most cost effective. PRDE was able to consider the cost of service to eligible locations separate from the cost of service to ineligible locations because the RFP required bidders to provide separate cost proposals for each type of location. Despite this exercise, and due to an oversight, which PRDE regrets, it did not include in its Vendor Evaluation Matrix a separate category for the cost of service to ineligible locations. The Commission can rest assured that PRDE is in process of modifying its evaluation matrix to

²¹ 47 C.F.R. § 1.3.

²² *Northeast Cellular Telephone Co. v. FCC*, 897 F.2d 1164, 1166 (D.C. Cir. 1990) ("*Northeast Cellular*")

²³ *WAIT Radio v. FCC*, 418 F.2d 1153, 1159 (D.C. Cir. 1969); *Northeast Cellular*, 897 F.2d at 1166.

²⁴ *Northeast Cellular*, 897 F.2d at 1166.

account for the cost of any ineligible services and/or ineligible locations for which it might seek proposals in the future.

Even if PRDE had created a separate category for cost of service to ineligible locations and assigned it a weight lower than the weight assigned to the cost of service to eligible locations, Claro would have still received a higher overall rating and score. The cost proposals by both vendors, which are attached to this Request and which separately list the cost of service to eligible locations and the cost of service to ineligible locations, plainly reflect this. Claro's cost proposal for service to eligible locations was \$7,563,864, or 31.5 percent lower than AT&T's proposal of \$9,537,095. In addition, Claro's cost proposal for service to ineligible locations was \$1,687,236, or 30.5 percent lower than AT&T's proposal of \$2,195,576. This is a significant fact because, as the Commission has stated, "The competitive bidding process is a key component of the Commission's effort to ensure that universal service funds support services that satisfy the precise needs of an institution, *and that the services are provided at the lowest possible rates.*"²⁵ In other words, one of the key purposes of the competitive bidding rules is to ensure that applicants will obtain the lowest price possible. In this case, PRDE selected the vendor that offered the lowest possible rate, thus obtaining the advantage of competition to the fullest extent possible consistent with the Commission's competitive bidding process.

B. A waiver under the particular facts of this case would be consistent with Commission precedent.

In the *Allendale County* decision, the Wireline Competition Bureau ("Bureau") determined that while seven applicants did not comply with the Commission's rule to assign the highest weight to price when evaluating bids, a waiver was appropriate because the winning

²⁵ *In the Matter of Federal-State Joint Board on Universal Service; Changes to the Board of Directors of the National Exchange Carrier Association, Inc.*, CC Docket No. 97-21 *et al.*, Fourth Order on Reconsideration and Report and Order, 13 FCC Rcd 5318, 5425-26, ¶ 185 (1997) (emphasis added) ("*Universal Service Fourth Order*").

vendors' cost proposals were lower than the competing bids and, therefore, each applicant selected the least expensive service offering.²⁶ The Bureau also found that a waiver was appropriate in the case of three applicants who failed to assign the highest weight to the price category but because they only received one responsive bid, the responsive bid necessarily offered the lowest price.²⁷ Finally, the Bureau also found that a waiver was appropriate in the case an applicant who assigned an 80 percent weight to performance and a 20 percent weight to price because the applicant was seeking to avoid recurrence of a prior situation in which it selected the lowest cost proposal but the vendor's equipment did not work in the applicant's buildings.²⁸ The Bureau reached a similar conclusion in the *Midlothian* decision, finding that a waiver of the Commission's competitive bidding requirements was in the public interest because, despite the ambiguity as to whether *Midlothian* assigned the highest weight or value to price in its vendor evaluation process, it ultimately selected the least expensive service offering.²⁹ The Bureau also granted waivers in the *Euclid City School District* decision, finding that the applicants "selected the least expensive responsive service offerings, despite failing to assign the highest weight to price in their vendor evaluation processes,"³⁰ and in the *Wheeling School District* decision, finding that while it could not determine whether *Wheeling* used price as the primary factor, "the record is clear that *Wheeling* did select the lowest price vendor."³¹

²⁶ *Requests for Review of Decisions of the Universal Service Administrator by Allendale County School District*, DA 11-723, Order, 26 FCC Rcd 6109, ¶ 10 (Wireline Comp. Bur. 2011) ("*Allendale County*").

²⁷ *Allendale County*, 26 FCC Rcd 6109, ¶ 10.

²⁸ *Allendale County*, 26 FCC Rcd 6109, ¶ 11.

²⁹ *Request for Review of a Decision of the Universal Service Administrator by Midlothian School District*, DA 13-1422, Order, 28 FCC Rcd 8970 (Wireline Comp. Bur. 2013).

³⁰ *Requests for Review of Decisions of the Universal Service Administrator by Euclid City School District*, DA 12-1843, Order, 27 FCC Rcd 14169, ¶ 2 (Wireline Comp. Bur. 2012).

³¹ *Requests for Review of Decisions of the Universal Service Administrator by Wheeling School District*, DA 13-1891, Order, 28 FCC Rcd 13122, ¶ 6 (Wireline Comp. Bur. 2013).

PRDE's situation is similar to that of the applicants in *Allendale County, Midlothian, Euclid City School District* and *Wheeling School District* that received a waiver with respect to one outcome determinative factor: PRDE, like those applicants, conducted a competitive bidding process that resulted in the selection of the least expensive service offering. As in those cases, there is no evidence here that PRDE has violated any state or local procurement laws. Therefore, like in those cases, a limited waiver of the Commission's rules would be in the public interest given the facts in this case, and the fact that such a determination will result in more effective implementation of Commission policy on competitive bidding.

There is one aspect in which PRDE is in a much different position than that of the applicants' in the *Allendale County, Midlothian* and *Euclid City School District* decisions: the applicants in those cases did not assign the highest weight to price, while PRDE did assign the highest weight to price.³² Thus, PRDE's competitive bidding process demonstrates greater compliance with the Commission's rules than that demonstrated by the applicants in these cases. This, too, weighs in favor of a limited waiver.

In the *West Oso* and *Henrico County* decisions, the Bureau concluded that just because an applicant can, "with the benefit of hindsight," find a way to either "re-assign point values" or "re-engineer its bidding process" to "reach an identical result using price as the primary factor does not demonstrate compliance with the Commission's rules."³³ This is not the situation here. PRDE is not attempting to "re-assign points" or "re-engineer" its bidding process to reach a

³² As previously noted, the Bureau was unable to determine in the *Wheeling School District* decision whether Wheeling used price as the primary factor, but granted a waiver because the applicant selected the lowest price vendor.

³³ *Request for Waiver and Review of a Decision of the Universal Service Administrator by West Oso Independent School District*, DA 14-815, Order, 29 FCC Rcd 6093, ¶ 5 (Wireline Comp. Bur. 2014) ("*West Oso Independent School District*"); *Request for Review of a Decision of the Universal Service Administrator by Henrico County School District*, DA 13-999, Order, 28 FCC Rcd 6277 (Wireline Comp. Bur. 2013) ("*Henrico County*"), *recon. denied*, DA 13-1884, 28 FCC Rcd 13015 (Wireline Comp. Bur. 2013).

desired result because, contrary to the applicants in *West Oso* and *Henrico County*, PRDE actually assigned the highest number of points to the price category.³⁴ Specifically, West Oso assigned 25% to price and 25% to “understanding of needs,” while Henrico County assigned 25% to “functional requirements” and 25% to “implementation services.” In contrast, PRDE assigned 35% to price, higher than any other single category. Had PRDE created an additional category to evaluate the cost of service to ineligible locations only, Claro would still have received a higher overall rating and score than AT&T because, as evidenced in the bid proposals, Claro’s proposal for service to ineligible locations was significantly lower than AT&T’s. The oversight in not creating a separate category for the cost of service to ineligible locations did not, in this case, frustrate the Commission’s primary goal of ensuring that “services are provided at the lowest possible rates.”³⁵

C. PRDE cost allocated the ineligible locations from its funding request consistent with USAC guidance.

PRDE was aware that it could seek E-rate support only for eligible locations. This is evident from the record in this case. On March 3, 2014, the Evaluation Committee discussed the fact that, “the total annual contract pricing will be for all schools, but that the actual FY2014 E-Rate application *will only include eligible sites* -- the contract will include all sites to permit the Department to include sites brought into eligibility on subsequent applications, without re-bidding or having to amend the contract.”³⁶ Similarly, PRDE was aware that unless and until the ineligible locations became eligible for E-rate funding, it would have to bear 100 percent of the cost of service to ineligible locations. As reflected in the March 3, 2014 Meeting Minutes, the

³⁴ See *West Oso Independent School District*, 29 FCC Rcd at 6094, ¶ 3; *Henrico County*, 28 FCC Rcd at 6278, ¶ 4.

³⁵ *Universal Service Fourth Order*, 13 FCC Rcd at 5425-26, ¶ 185.

³⁶ Exhibit H at p. 4 (emphasis added).

Evaluation Committee discussed that, “Under the contract, the vendor will invoice the Department for 10% of the pricing for eligible entities, *and 100% for the ineligible entities.*”³⁷

The RFP required bidders to break out the cost of providing service to eligible locations from the cost of providing service to ineligible locations. The purpose of this requirement was to ensure that PRDE would have the necessary information to evaluate the cost effectiveness of services that qualified for E-rate funding from those that did not. Armed with this information, PRDE cost allocated 100 percent of the cost of providing service to the ineligible locations in its Form 471 funding request. The manner in which PRDE performed the cost allocation might have been more readily apparent had the Block 5 FRN in FCC Form 471 shown the full monthly recurring cost of WAN services for both ineligible and eligible locations, and then, shown the dollar cost allocation for the ineligible sites. Instead, the FRN, as submitted, included only the costs for the eligible sites. However, USAC’s PIA Reviewers and Client Service Bureau often recommend that applicants pre-compute such cost allocations – offline – and then simply show the final, eligible cost in Block 5 in FCC Form 471. PRDE properly followed USAC’s guidance in its cost allocation.

The oversight in not creating a separate category for the cost of service to ineligible locations did not frustrate the fundamental requirement of the E-rate program that support be limited to eligible products and services at eligible locations. This is a critical factor in favor of a limited waiver.

³⁷ Exhibit H at p. 5 (emphasis added).

D. Ambiguity as to whether “cost of eligible services” means “cost of eligible services at eligible locations” weighs in favor of a limited waiver of the Commission’s rules.

A waiver would also be appropriate in this case because there is ambiguity as to whether an applicant is prohibited from considering the cost of eligible services at locations that it intends to bring up to eligibility during the term of a multi-year contract. Stated differently, does “cost of eligible services” really mean “cost of eligible services at eligible locations”?

Section 54.503(c) requires that all bids submitted “for eligible products and services” be carefully considered.³⁸ Similarly, Section 54.511(a) states that, “in selecting a provider of eligible services,” applicants must “carefully consider all bids submitted and must select the most cost-effective service offering” and that “price should be the primary factor considered.”³⁹ The rules’ plain language refers to three concepts: (1) applicants must carefully consider all bids – which happens at the vendor evaluation stage; (2) bids are for eligible products and services; and (3) price should be the primary factor.

USAC, however, seems to have introduced an additional requirement not specified in the Commission’s rules, which is that applicants can only consider the cost of *eligible products and services at eligible locations*. Specifically, in the *Intent to Deny Letter*, USAC states that, “...it appears that you were comparing the total cost of the proposals including the cost for ineligible locations *and not just the cost for the eligible locations*.”⁴⁰ Then, in the same paragraph, USAC states that it is permissible to include the cost of ineligible locations in the bid evaluation matrix “as long as it is a separate factor and is not included with the eligible portion of the products and

³⁸ 47 C.F.R. § 54.503(c).

³⁹ 47 C.F.R. § 54.511(a).

⁴⁰ Exhibit A, *Intent to Deny Letter* at p. 1.

services as the primary factor.”⁴¹ However, the Commission’s rules require consideration of the cost of *eligible services*, not *eligible services at eligible locations*. If applicants are limited to considering the cost of eligible services at eligible locations, the mission of bringing as many schools as possible up to E-rate standards will become significantly more cumbersome because it would force applicants to spend significant human and financial resources to go through additional competitive bidding processes once locations become eligible, while simultaneously diminishing the purchasing power of applicants. This would not be a good use of limited E-rate dollars, USAC resources and applicant resources.

USAC’s interpretation also appears inconsistent with how it views bids for the provision of cellular telephone service. Bid evaluations for cellular voice service have never required that the potential for use from an ineligible location (such as use from a teacher’s automobile en route to school) be factored into the bid evaluation matrix at the vendor evaluation stage. During the vendor evaluation stage, applicants are permitted to consider the cost of cellular voice service from ineligible locations; then, when the applicant completes Block 5 FRN in FCC Form 471, the usage from ineligible locations requires a cost allocation in the amount of funding requested. It is unclear why this approach is permissible in the wireless context, but impermissible in the wireline context.

To be clear, PRDE is not suggesting that applicants are permitted or should be permitted to obtain E-rate funds for eligible service at ineligible locations. However, the manner in which USAC has interpreted the Commission’s rules has produced sufficient ambiguity that a limited waiver would be in the public interest.

⁴¹ Exhibit A, *Intent to Deny Letter* at p. 1.

E. PRDE did not engage in in any practice that undermines the framework of the competitive bidding process.

In the cases where the Commission has granted a rule waiver related to the competitive bidding process in the E-rate program, a critical factor in the Commission's decision has been the absence of waste, fraud or abuse. In this case, PRDE took extensive steps to ensure compliance with the E-rate program rules. PRDE issued a comprehensive RFP that complied with PRDE's own E-rate Procurement Guidelines and adhered to relevant Puerto Rico procurement laws. Members of the Evaluation Committee received training materials that, among other things, discussed the competitive bidding process and the vendor selection process, including the fact that the price of eligible products and services must be given the greatest weight and be the primary factor considered in selecting vendors.⁴² The Evaluation Committee, with the advice of in-house Technical Advisors and E-rate consultants, met on multiple occasions to discuss the vendor section process and the E-rate program rules.

PRDE also adhered to all core program requirements. Specifically, PRDE: (1) submitted the required forms within the requisite deadlines; (2) waited the 35 days required by the combined E-rate and Puerto Rico procurement requirements before selecting a service provider; (3) conducted a fair and open competitive bidding process in which all vendors had access to the same information; (4) complied with relevant PRDE and Puerto Rico procurement laws; (5) carefully evaluated all bids received, assigning the most points to cost; and (6) selected the provider that offered the lowest cost effective bid. At no point did PRDE engage in any practice that undermined the framework of the competitive bidding process.

⁴² See Puerto Rico Department of Education, FY2014 E-Rate Evaluation Committee Member Training, dated December 19, 2013, attached as Exhibit K.

F. The Commission must consider the hardship that PRDE and the hundreds of thousands of students it serves in Puerto Rico will face in the absence of a limited rule waiver.

Failure to obtain a waiver will result in denial of PRDE's application for WAN services for FY2014. Such a result would be disastrous for the approximately 423,934 public school students in Puerto Rico that PRDE serves and for whom it must provide an education that will prepare them for the 21st Century. The median income in Puerto Rico is \$16,364, or approximately 70 percent less than the U.S. median income of \$53,046.⁴³ The economic situation in Puerto Rico is precarious. A recent online article by Knowledge@Wharton at the Wharton School of the University of Pennsylvania summarizes the situation as follows:

Unemployment sits above 14% — more than double the mainland rate. Businesses are closing in droves. The electricity authority teeters on the verge of default, which would cause the largest-ever restructuring of state or local debt. And with some 1,000 Puerto Ricans a week leaving for the U.S. mainland, a full third of people born on the island now live elsewhere — the first time that has happened since the 1700s, according to a new Pew Research report. Things are indeed “bleak” for Puerto Rico.⁴⁴

The seriousness of Puerto Rico's situation is evidenced by the fact that the Obama Administration has named a team of Administration experts to work with Puerto Rico “to marshal existing federal resources” and assist Puerto Rico in “maximizing the impact of existing federal funds flowing to the Island.”⁴⁵ The combined team consists of members of Governor Garcia Padilla's Administration and federal experts from the U.S. Department of Education, the U.S. Department of Health and Human Services, the U.S. Department of Housing and Urban

⁴³ Income information from the 2008-2012 American Community Survey can be found here: http://www.census.gov/acs/www/data_documentation/summary_file/.

⁴⁴ *The Financial Hurdles to Rebuilding Puerto Rico's Economy*, Knowledge@Wharton, Wharton School, University of Pennsylvania, available at: <http://knowledge.wharton.upenn.edu/article/clrebuilding-puerto-ricos-economy/#> (last visited Dec. 9, 2014).

⁴⁵ *Supporting Puerto Rico's Economic Development Progress*, The White House, President Obama and the Hispanic Community, Nov. 21, 2013, available at <http://www.whitehouse.gov/blog/2013/11/21/supporting-puerto-ricos-economic-development-progress> (last visited Dec. 9, 2014).

Development, the U.S. Environmental Protection Agency, the U.S. Office of Management and Budget, the National Economic Council, the Council of Economic Advisors and the U.S. Department of the Treasury. This is not an insignificant effort.

If the application is denied, Puerto Rico and its students will lose over \$7 million in E-rate funding for FY2014 (approximately \$28 million over the four-year contract awarded to the selected vendor). When compared to the infraction (that is, failure to consider the cost of service to ineligible locations in a category weighed at less than 35 percent – which would not have made a difference in the outcome of the vendor selection), the loss of over \$7 million in funding would be draconian and only serve to punish the students.

Failure to obtain this funding would also frustrate the President's goal of ensuring that 99 percent of American students can benefit from high-speed digital connections in teaching and learning.⁴⁶ The President has designated the E-rate program as the primary vehicle to accomplish this goal. While PRDE is intent on bringing into the classroom the technology that our children need in order to succeed in the 21st Century, it cannot do it alone; E-rate funding is absolutely essential. PRDE respectfully asks the Commission to consider the hardship that hundreds of thousands of public school students will bear in the absence of a limited waiver request.

III. CONCLUSION

For the reasons previously stated, PRDE respectfully requests a limited waiver of Sections 54.503(c) and 54.511(a) of the Commission's rules with respect to its application for E-rate funding for WAN services for FY2014, as well as any other Commission rule establishing procedural deadlines that might be necessary to effectuate a waiver of these rules.

⁴⁶ See The White House, ConnectED: President Obama's Plan for Connecting All Schools to the Digital Age, available at: http://www.whitehouse.gov/sites/default/files/docs/connected_fact_sheet.pdf (last visited Dec. 9, 2014).

Respectfully Submitted,

**PUERTO RICO DEPARTMENT OF
EDUCATION**

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December 12, 2014

Exhibits

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| Exhibit A | USAC's Intent to Deny Letter (dated September 25, 2014) |
| Exhibit B | FCC Form 470 No. 913060001186890 |
| Exhibit C | Request for Proposals For E-Rate FY2014 Wide Area Network and Internet Service (dated December 20, 2013) |
| Exhibit D | AT&T's Cost Proposal |
| Exhibit E | Claro's Cost Proposal |
| Exhibit F | Excerpt from February 20, 2014 Meeting Minutes |
| Exhibit G | Vendor Evaluation Matrix |
| Exhibit H | Excerpt from March 3, 2014 Meeting Minutes |
| Exhibit I | PRDE submission to USAC (dated October 2, 2014) |
| Exhibit J | PRDE submission to USAC (dated November 20, 2014) |
| Exhibit K | Evaluation Committee Member Training (dated Dec. 19, 2013) |